

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10723; Ruling
Date: April 26, 2016; Ruling No. 2016-4342; Agency: Department of Corrections;
Outcome: Request denied – Untimely.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2016-4342
April 26, 2016

The grievant, by her representative, has requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management administratively review the hearing officer's decision in Case Number 10723. As more fully stated below, because the grievant's request for administrative review is considered untimely, EDR is unable to review the hearing officer's decision.

FACTS

The hearing decision in Case Number 10723 was issued on February 9, 2016.¹ The decision was sent by the hearing officer's office to representatives for the agency and the grievant on that date. However, a copy of the decision was not sent to the grievant herself. On or about March 28, 2016, the grievant communicated with EDR about the status of her case. Having already received a copy from the hearing officer previously, EDR forwarded a copy by e-mail to the grievant on the same date. On April 12, 2016, EDR received the grievant's request for an administrative review from her representative.

DISCUSSION

The Grievance Procedure Manual provides that "[r]equests for administrative review must be in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision."² Further, the February 9, 2016 hearing decision clearly advised the parties that any request they may file for administrative review must be received by the reviewer within 15 calendar days of the date the decision was issued.³ However, EDR received the grievant's request for administrative review on April 12, 2016, well beyond the 15 calendar day deadline. Accordingly, the grievant's request for administrative review by EDR is untimely.

¹ Decision of Hearing Officer, Case No. 10723, Feb. 9, 2016 ("Hearing Decision"), at 1.

² *Grievance Procedure Manual* § 7.2.

³ Hearing Decision at 4-5.

The grievant has presented some evidence of “just cause” for the delay.⁴ While a representative for the grievant received the hearing officer’s decision at the appropriate time, the grievant herself was never sent a copy. Providing the decision to the grievant’s representative would generally be sufficient to show that the grievant had notice of the decision’s issuance given the representative is the grievant’s agent for purposes of the hearing.⁵ However, both the *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings* specifically require that the grievant be sent a copy of the hearing decision, not just the grievant’s representative.⁶ Therefore, the hearing officer’s failure to provide the decision directly to the grievant could serve as a basis to extend the time period in which the grievant has to appeal the decision.

Given the short timeframe to submit an administrative appeal (15 calendar days), if the grievant’s representative fails to send a copy of the decision to the grievant and/or if the representative and the grievant are no longer associated following the hearing, the failure of the hearing officer to provide the decision to the grievant directly could serve to explain a grievant’s delayed appeal. However, in this case, while it is not clear whether the grievant’s representative ever notified her about the hearing officer’s decision, what is clear is that the grievant and her representative are still associated inasmuch as the appeal received by EDR was submitted by the grievant’s representative. In light of this existing relationship, EDR cannot find that the situation warrants excusing the delayed filing of an appeal in this case.⁷

EDR is sympathetic to the grievant’s situation, especially given that there are significant failings in the hearing officer’s decision that could have been addressed in a timely appeal.⁸ However, it is the grievant’s burden to present information supporting just cause for a delayed filing.⁹ While the grievant herself might be able to demonstrate that she is blameless for the delayed filing, there are some factual questions that have not been suitably addressed in the grievant’s appeal. For instance, it has not been demonstrated whether there were any

⁴ “Just cause” is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.” *Grievance Procedure Manual* § 9.

⁵ See discussion *infra* and notes 13-14.

⁶ *Grievance Procedure Manual* § 5.9; *Rules for Conducting Grievance Hearings* § V(C).

⁷ EDR is unaware of any other specific parameters of the relationship between the grievant and her representative beyond those assumed here. If there are specific parameters of the relationship that would have warranted addressing this situation differently by EDR, they have not been raised by the grievant or her representative.

⁸ In the request for administrative review, the grievant’s representative has even sought additional time to review the hearing recording prior to submitting further grounds on appeal. The grievant’s representative first requested a copy of the hearing recording on April 1, 2016, not when he was first notified of the issuance of the decision in February 2016. More importantly, EDR does not extend the 15 calendar-day appeal period for a party to review the hearing recording. EDR has traditionally allowed parties to submit a supplemental brief with hearing recording citations after the deadline passes, as long as a ruling request is submitted within the 15 days and includes the bases for the appeal (similar to a Notice of Appeal in court proceedings). Grounds not raised to EDR within the 15 calendar-day deadline cannot be considered if later added to a brief submitted after the deadline. The grievant’s representative was advised of these considerations. Therefore, the request for more time to submit additional grounds for appeal following a review of the hearing recording is not a sufficient consideration of just cause here.

⁹ *Cf. Grievance Procedure Manual* § 2.2 (noting the grievant’s burden to demonstrate the timely filing of a grievance).

communications between the grievant and her representative following the hearing.¹⁰ Giving the grievant the benefit of the doubt, EDR can still not ignore the fact that the grievant's representative actually received a copy of the hearing officer's decision and either did not forward it to the grievant¹¹ or did not adequately communicate with her to assess her desire for appeal.¹² In short, without a basis to find contrary, EDR considers the grievant to have received notice, constructive or imputed, of the hearing decision by the hearing officer providing the decision to her representative.¹³ For the above reasons, the circumstances do not provide a sufficient basis for EDR to find just cause in this case.¹⁴

APPEAL RIGHTS

A hearing officer's decision becomes a final hearing decision when the 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request or once all timely requests for review have been decided.¹⁵ Because the grievant's administrative review request to EDR was untimely, the hearing decision became a final hearing decision on **February 24, 2016**, after the 15 calendar day period expired. The grievant would have had 30 calendar days from that date to appeal the hearing decision to the circuit court in the jurisdiction in which the grievance arose. While it may be that the circuit court appeal window has also closed in this case, the determination of whether such an appeal, if it is filed, would be considered timely based on the circumstances of the case is a decision for the court to make. If the grievant wishes to pursue such an appeal, she should consider doing so as soon as possible. The basis of any such appeal must have been that the final hearing decision is contradictory to law.¹⁶



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¹⁰ The existence of such contacts would not generally support an argument for a justifiable delay in this situation.

¹¹ See *Rules for Conducting Grievance Hearings* § III(F) (discussing the responsibility of advocates to transmit hearing officer communications).

¹² It should additionally be noted that the hearing officer's decision contains apparent potential errors. For instance, while the grievant was given two Written Notices in this case, the hearing officer somehow created four different Written Notices and upheld the agency's action based on those four separate disciplinary actions. Hearing Decision at 1, 4. In short, upon reading the hearing officer's decision, the grievant's representative should have immediately been aware that there were potentially serious grounds for appeal central to the hearing officer's determinations, necessitating, one might surmise, immediate contact with the grievant. Yet, these issues about the Written Notices and the hearing officer's associated findings were not asserted in the April 12 request for administrative review. As such, even if EDR were able to take jurisdiction over this appeal, one of the most concerning parts of the hearing officer's decision could not be addressed as it was not raised by the grievant's representative.

¹³ See, e.g., *Burruss v. Green Auction & Realty Co.*, 228 Va. 6, 11, 319 S.E.2d 725, 727-28 (1984) (discussing the general principle that "notice to an agent of matters relating to the subject of the agency is notice to his principals").

¹⁴ See also EDR Ruling Number 2013-3396 for application of the "just cause" standard to an agency's untimely request for administrative review. In that ruling, EDR determined that evidence that the hearing decision was sent to a former address of the agency's representative was not a sufficient basis to demonstrate "just cause," where the decision had also been sent to an employee of the agency even though that employee was on vacation.

¹⁵ See *Grievance Procedure Manual* § 7.2(d).

¹⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).